

**UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF ALABAMA**

In re

Case No. 03-10501-WRS
Chapter 11

COLLINS SIGNS,

Debtor

**MEMORANDUM DECISION ON MOTION FOR ADEQUATE
PROTECTION FILED BY ALBERT SMITH GROUP**

On May 7, 2003, the Court held an evidentiary hearing on “Albert Smith Group’s Combined Motion for Adequate Protection, Relief from Automatic Stay, and to Compel Assumption or Rejection of Executory Contract and Objection to Motion to Sell Assets under Section 363.” (Doc. 104). Albert Smith Group was present by counsel James Ammeen and the Debtor was present by counsel C.H. Espy, Jr. The Court heard evidence and the argument of counsel and took the matter under submission. Both parties have filed briefs in support of their respective positions. (Docs. 144, 156, 163). For the reasons set forth below, the Court grants in part and denies in part the motion.

I. INTRODUCTION

This bankruptcy case was commenced on March 4, 2003, as an involuntary proceeding. The Debtor did not oppose the petition and an order for relief was entered on March 26, 2003. (Doc. 20). On April 4, 2003, the Debtor filed a motion proposing to sell the bulk of its assets to Cummings Incorporated. (Doc. 44). A number of creditors, including Albert Smith Group filed objections to the proposed sale. (Doc. 104). On April 29, 2003, the Court conducted an evidentiary hearing lasting approximately six hours. At the conclusion of the hearing, all of the

objecting parties, including Albert Smith Group withdrew their objections. Counsel for the Debtor circulated a draft order, which was consented to by all objecting parties, including Albert Smith Group. The Court then signed the agreed upon order on May 5, 2003. (Doc. 127). At the outset, the Court denies the motion of Albert Smith Group to the extent that any relief requested is inconsistent with this Court's May 5, 2003 order. In its motion, Albert Smith Group makes a detailed request for relief. (Doc. 104, pp. 6-7).

II. THE MOTION FOR RELIEF FROM AUTOMATIC STAY

As the objection to sale of assets is now moot, the Court will concentrate on the motion for relief from the automatic stay and the motion to compel the assumption or rejection of executory contract. A motion for relief from the automatic stay is governed by the provisions of 11 U.S.C. Section 362.

The Debtor is a corporation with its offices and manufacturing facilities in Dothan, Alabama. It is in the business of manufacturing outdoor signs for businesses such as Waffle House, Burger King and BP (British Petroleum). Albert Smith Group is an Australian concern which designs and manufactures machines which are used by sign manufactures such as the Debtor. The Debtor needed a specially built machine to manufacture a portion of the signs. New BP stations have a distinct rounded edge on their gasoline stations which requires a specially built machine to manufacture the rounded edge. The parties refer to this as a "bullnose." Albert Smith Group and the Debtor entered into a contractual relationship whereby the bullnose

machine would be designed by the Albert Smith Group and manufactured at their direction for shipment to the Debtor. The bullnose was delivered to the Debtor in December of 2002.

Albert Smith Group contends that title to the machine has not passed to the Debtor. If that is so, Cummings did not acquire any interest in the machine pursuant to the asset purchase agreement. Albert Smith Group is free to litigate this question either in an adversary proceeding in this court or in another forum. In addition, Albert Smith Group contends that it is entitled to royalties for the use of the bullnose machine. To the extent that the Debtor used the machine and thereby incurred a liability for a royalty, Albert Smith Group may have a claim against the estate. It need not obtain relief from the automatic stay to file a proof of claim. However, the Court will not grant relief from the automatic stay and permit Albert Smith Group to litigate with the Debtor in another court.

Rodney Smith, Managing Director of the Albert Smith Group, testified at the May 5, 2003, hearing as to the existence of a "Confidentiality Agreement" which was entered into in conjunction with sale of the bullnose. Smith contends that the technology developed by his firm is to be kept secret and may not be shared with others. As it appears that at least physical possession of the machine has been transferred to Cummings, it would appear that the Debtor is not in a position to violate the Confidentiality Agreement. If Albert Smith Group has a cause of action against Dennis Collins individually or Cummings it is free to bring suit unaffected by the automatic stay, which affects only the Debtor.

As a final matter, the Albert Smith Group seeks an order requiring the Debtor to assume or reject the executory contract. The Debtor opposes that request. (Doc. 163). As the Debtor is

not in a position to assume the contract, and as Albert Smith Group contends that the Debtor may not assign the contract, 11 U.S.C. Section 365©)(1), it does not appear that there is any basis upon which to deny this aspect of the motion of Albert Smith Group. The executory contract between Albert Smith Group and the Debtor is rejected.

III. SPECIFIC RELIEF REQUESTED

For purposes of clarity, the Court will address each item of relief using the numbering scheme in the motion. See, (Doc. 104).

A. a.i. In Paragraph a.i., Albert Smith Group requests an injunction against “Cummings Signs” to cease its operation of the bullnose. As the bullnose has been sold to Cummings pursuant to the asset sale, which was approved by the Court on May 5, 2003, an injunction with respect to the Debtor has become moot.¹ However, to the extent that the Albert Smith Group has a cause of action against Cummings, it may pursue the same without relief from the automatic stay.²

B. a.ii. In Paragraph a.ii. Albert Smith Group request an accounting as to the details of the signage processed. Such a request appears to be reasonable and within the scope of that which is required of a Debtor-in-Possession. 11 U.S.C. Section 704(7), 11 U.S.C. Section

¹ Whether such an injunction could be entered pursuant to the instant motion or whether an Adversary Proceeding would have to be brought is, at this time, a moot point.

² The Court does not have an opinion as to the merits of any such claim. To the extent that it may have such a claim, it may proceed directly against Cummings without involving this Court further.

1106(a)(1), 11 U.S.C. Section 1107(a). The Debtor-in-Possession shall produce the requested information within 30 days of the date hereof.

C. a.iii. In Paragraph a.iii. Albert Smith Group requests that all defaults be cured. In light of the sale to Cummings, this request is denied as moot.

D. a.iv. In Paragraph aiv. Albert Smith Group request an administrative priority claim. If a “super priority” claim pursuant to 11 U.S.C. Section 507(b), is requested, that request is denied for two reasons. First, the Debtor in Possession has not purported to provide adequate protection, therefore, it cannot be said that adequate protection payments are inadequate. Second, relief under this section is limited to creditors with liens. The evidence here does not support a finding that Albert Smith Group has a lien on the bullnose machine, or any other property of the Debtor. Albert Smith Group is free to file a proof of claim pursuant to 11 U.S.C. Section 503 if it is of the view that such a claim is appropriate, subject to the Debtor’s right to interpose an objection.

E. a.v. In paragraph a.v., Albert Smith Group requests a lien upon the assets. The Court finds that this claim was waived at the conclusion of the April 29, 2003, hearing when all objections were withdrawn.


F. b.i. In Paragraph b.i., Albert Smith Group requests leave to bring an infringement claim against the Debtor. This request is denied, without prejudice to its right to file a proof of claim in this bankruptcy proceeding.

G. b.ii. In Paragraph b.ii., it seeks relief from the automatic stay to repossess the bullnose. As the bullnose is no longer property of the estate, Albert Smith Group may proceed against Cummings as it finds appropriate. This request is therefore denied as moot.

H. c. In Paragraph c, it is requested that the sale of assets not be permitted. This request is moot in light of the Court's May 5, 2003, order.

I. d. In Paragraph d, it is requested that the Debtor reject its executory contract with the Albert Smith Group. The aspect of the motion is granted. The executory contract is rejected.

Done this 20 day of June, 2003.



William R. Sawyer
United States Bankruptcy Judge

c: Collier H. Espy Jr., Attorney for Debtor
James J. Ammeen Jr., Attorney for Albert Smith Group